Supreme Court, U.S.
FILED

No. 92-501

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK BACHNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the delay between the return of the indictment and the commencement of petitioner's trial violated his constitutional or statutory rights to a speedy trial.

2. Whether petitioner was prejudiced by the district court's denial of his motion for a severance because a co-defendant's attorney presented an antagonistic defense at trial.

3. Whether the district court erred in failing to conduct a hearing on petitioner's motions to suppress evidence seized during the search of his house.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is unpublished, but the judgment is noted at 946 F.2d 1546 (Table), *sub nom. United States* v. *Staffire*.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1991. A petition for rehearing was denied on December 26, 1991. Pet. App. A37-A39. On March 20, 1992, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 22, 1992. On April 14, 1992, Justice Kennedy granted a further extension to and including May 22, 1992. The petition was filed on May 21, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conducting a criminal enterprise, in violation of 21 U.S.C. 848; five counts of conspiring to manufacture, import, and distribute cocaine, in violation of 21 U.S.C. 846 and 963; two counts of importing cocaine, in violation of 21 U.S.C. 952(a); four counts of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); two counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1); one count of attempting to manufacture cocaine with the intent to import it into the United States, in violation of 21 U.S.C. 963; and one count of receiving stolen government property, in violation of 18 U.S.C. 641. Gov't C.A. Br. 3. He was sentenced to life imprisonment and was fined $2,750,000. The court of appeals affirmed. Pet. App. A1-A36.

1. Petitioner was the leader of a cocaine smuggling and distribution ring that operated in Florida during the 1980s; the crimes involved in this case arose out of three incidents. First, in 1982, petitioner and Edward Staffire smuggled a load of cocaine into the United States from Colombia in an airplane owned by petitioner.

The second incident occurred three years later, when petitioner and Douglas Donahue flew to Colombia in an amphibious flying boat (referred to as an Albatross) owned by petitioner. Two other men, Alan Cheshire and Richard Mier, accompanied petitioner and Donahue. The men picked up a load of cocaine in Colombia and flew it to an island in the Bahamas. After returning to Florida, petitioner and Cheshire used petitioner's helicopter to

retrieve the cocaine from the island. They moved the cocaine to another location in the Bahamas, where it could be stored while they investigated possible landing sites in the United States. Later, acting on instructions from petitioner, Cheshire and Staffire flew the helicopter to the Bahamas, retrieved the cocaine, and delivered it to petitioner at the selected landing site in Florida.

Finally, in 1986, petitioner arranged to sell cocaine to FBI informant George Chappell. Petitioner told Chappell that he was establishing himself as a supplier of ether (a solvent used in processing cocaine) to cocaine producers in South America, and that he already had shipped ether to Aruba. DEA agents and Aruban authorities later discovered 100 drums of ether that belonged to petitioner. Pet. App. A6-A7.

Petitioner and other members of the smuggling ring were arrested in 1987. After petitioner's arrest, law enforcement officers obtained a warrant to search his house. During the search, the officers found numerous items used in packaging and distributing cocaine, including money counting machines and a heat-sealing machine that was used to seal plastic bags. Pet. App. A7.

2. An indictment returned on March 17, 1987, charged petitioner and co-defendants Staffire, Donahue, and Mier with narcotics offenses. Gov't C.A. Br. 2. Petitioner was detained pending trial. Gov't Habeas C.A. Br. 3.[1]

Before trial, petitioner filed two motions to suppress evidence seized during the warrant-authorized search of his house. In one motion, petitioner claimed that the af-

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[1] "Gov't Habeas C.A. Br." refers to the brief filed by the government in response to petitioner's appeal from the district court's order denying petitioner's petition for a writ of habeas corpus seeking release from pretrial detention. That appeal was docketed in the court of appeals as Nos. 88-6209 and 88-6230.

fidavit used to obtain the warrant was insufficient to establish probable cause, that the affidavit contained stale information and unreliable hearsay, and that the scope of the search exceeded that authorized by the warrant. Motion to Suppress [Probable Cause Motion] 2-15. In the other motion, petitioner asserted that the warrant affidavit contained material misrepresentations and omissions, and that under this Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), he was entitled to an evidentiary hearing to determine if the officers intentionally or recklessly included false information in the affidavit.[2] Motion to Suppress [*Franks* Motion] 3-13. The government filed a detailed response to petitioner's suppression motions. In response to petitioner's first motion, the government disputed petitioner's claim that the warrant affidavit was insufficient to establish probable cause. Answer to Motion to Suppress 2-4. In any event, the government contended, the evidence seized under the warrant should not be suppressed because the officers who conducted the search reasonably and in good faith believed that the warrant was valid. Answer to Motion to Suppress 8-9. With respect to petitioner's *Franks* motion, the government argued that petitioner's assertions that the warrant affidavit contained material misrepresentations and omissions were unsupported and misleading, and that petitioner had not made a sufficient

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[2] In *Franks*, the Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155-156.

threshold showing to obtain an evidentiary hearing under *Franks*. Answer to Motion to Suppress 9-18.

Before trial, petitioner filed a petition for a writ of habeas corpus, seeking release from custody based on his contention that the delay between the indictment and the trial violated his constitutional and statutory rights to a speedy trial. The district court concluded that the cause of the delay was the "unprecedented length" of another criminal trial in the same district,[3] in which the attorney who represented petitioner's co-defendant Donahue was involved. Gov't Habeas C.A. Br. 4-5, 12. The district court denied the habeas petition without opinion. See *id.* at 12-15.

Petitioner's trial began on February 6, 1989. Gov't C.A. Br. 2. On the first day of trial, the district court heard argument on petitioner's suppression motions. The following day, after hearing further argument, the court denied both motions, stating that it had reviewed the affidavit and search warrant and that it did not believe an evidentiary hearing was necessary. See Gov't C.A. Br. 36.

Petitioner was tried together with Staffire, Donahue, and Mier. During trial, Donahue's attorney informed the court that Donahue intended to testify that peti-

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[3] Trial in the other case began in November 1987 and continued until January 1989. Gov't Habeas C.A. Br. 5. The district court considering the habeas petition noted that "[t]he expectation at the beginning of [the other] case was [that] it would be done [in] six months or less," and that neither the court nor the lawyers could have foreseen that the trial would continue for more than a year. *Id.* at 12. The court also explained that there was "a published policy in this district that whatever judge begins a trial with lawyers, that judge understandably has the right to continue the trial to its conclusion[,] * * * so that a prior [trial] setting then gives priority and right to the lawyer's services." *Id.* at 13.

tioner had directed the 1985 smuggling flight to Colombia and had duped Donahue into piloting the aircraft. Petitioner then moved for a severance, claiming that his defense and Donahue's were antagonistic. The district court denied the motion. Donahue eventually decided not to testify, but his attorney's closing argument suggested that the government's witnesses had correctly described petitioner's activities. Pet. App. A25-A26, A34-A35.

3. On appeal, petitioner argued that the trial court should have severed his trial from Donahue's because of the conflict between his defense and Donahue's. Pet. App. A10-A11. The court of appeals rejected that claim. *Id.* at A24-A31. The court of appeals acknowledged that the defense presented by Donahue's attorney was "antagonistic and mutually exclusive as to [petitioner]," but held that any error in the district court's denial of petitioner's severance motion did not require reversal of his conviction because petitioner could not show "compelling prejudice" resulting from the district court's refusal to sever his trial from that of his co-defendant. *Id.* at A31. Observing that the evidence of petitioner's guilt was "overwhelming," the court stated that it was "convinced that [petitioner] received a fair trial and that the verdict was not prejudiced" by the comments of Donahue's attorney. *Ibid.*

Petitioner also argued that the district court erred in refusing to dismiss the indictment based on violations of his constitutional and statutory speedy trial rights, and that the court erred in failing to conduct a hearing on his motions to suppress the evidence seized during the search of his house. Pet. App. A12. The court of appeals did not specifically address those contentions, but stated that it had "carefully examined" petitioner's claims

other than the severance claim and had found them to be "without merit." *Id.* at A36.

ARGUMENT

1. Petitioner first contends (Pet. 7-19) that the delay between his indictment in March 1987 and the commencement of his trial in February 1989 violated his right to a speedy trial. In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court set out a four-factor test for determining whether delay between the initiation of criminal proceedings and the beginning of trial violates a defendant's Sixth Amendment right to a speedy trial. The test requires the court to consider the length of the delay, the cause of the delay, the defendant's assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay. 407 U.S. at 530-533. Although the delay of almost two years between petitioner's indictment and the beginning of trial justifies inquiry into the other *Barker* factors, petitioner's claim nevertheless fails because none of the other factors supports petitioner's claim.

First, petitioner is incorrect in asserting (Pet. 13) that the cause of the delay was an effort on the part of the government to postpone the trial "so that a preferred prosecutor could try the case." In fact, the district court found that the cause of the delay was the "unprecedented length" of another criminal trial in the same district, in which the attorney who represented petitioner's co-defendant Donahue was involved. See Gov't Habeas C.A. Br. 4-5, 12. Although the prosecutor who was originally assigned to this case also was involved in the other trial, the government made it clear to the court that it was prepared to proceed to trial in this case with another prosecutor. See *id.* at 7 ("if the Court says to the United States the trial date is set, * * * I will just be ready to

try it when the Court says to try it"). The pretrial delay, which resulted from the unavailability of the co-defendant's attorney and the co-defendant's inability or unwillingness to obtain other counsel, cannot fairly be attributed to the government.[4]

Second, petitioner did not assert his right to a speedy trial until October 1988, when he filed a petition for a writ of habeas corpus seeking release from detention and dismissal of the indictment on the ground that his speedy trial rights had been violated.[5] Moreover, the habeas petition makes clear that petitioner's principal interest was in obtaining his release from custody, not in securing a speedy trial. See Motion to Dismiss, C.A. App. Pt. C.

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[4] For this reason, the Court's decision in *Doggett* v. *United States*, 112 S. Ct. 2686 (1992), does not have any direct effect on the decision of the court of appeals. In *Doggett*, the Court held that an "extraordinary" eight-and-one-half-year delay between the defendant's indictment and arrest, which resulted from the government's "egregious persistence in failing to prosecute [him]," violated his right to a speedy trial. *Id.* at 2691, 2694. The period of pretrial delay in this case was far shorter than that in *Doggett*, and the delay here was not attributable to negligence on the part of the government.

[5] Petitioner errs in stating (Pet. 9) (without any supporting citation) that he "objected to each continuance, and sought severance from his co-defendant [Donahue]." Indeed, at a status conference in January 1988, petitioner's counsel advised the district court that "speaking for [petitioner], if the Government wanted a continuance to continue the case, I have no objection," as long as petitioner was concurrently released from custody. Gov't Habeas C.A. Br. 8-9. The record does not indicate that petitioner ever objected to any of the other continuances. Similarly, contrary to petitioner's statement, he did not file a pretrial motion for severance. See Gov't Habeas C.A. Br. 4; Docket Sheet, C.A. App. Pt. A.

Finally, petitioner failed to show sufficient prejudice to justify dismissal of the indictment. As the district court stated in rejecting the speedy trial claims raised in petitioner's habeas petition, petitioner had "introduced nothing and proffered nothing" to show prejudice and had "not even alluded to any real prejudice under the constitutional tests." Gov't Habeas C.A. Br. 15. Petitioner's only claim that the pretrial delay impaired his defense rests on his assertion (Pet. 17-18) that certain hotel records that might have cast doubt on the testimony of one of the government's witnesses were destroyed and that the owners of the hotel were unable to remember the contents of the records. That assertion is incorrect. Although the substitute Assistant United States Attorney who tried the case thought he would introduce such records into evidence, and requested that petitioner stipulate to their authenticity at the beginning of trial, the prosecutor discovered during trial that he had been mistaken about the existence of the records and that no such records had ever existed. See Gov't C.A. Br. 56-57.[6] Petitioner could not have been prejudiced by the loss of evidence that was never in existence. In the absence of any showing that his defense was hampered, petitioner's general claims of hardship resulting from the pretrial delay are not sufficient to establish a constitutional violation. See *United States* v. *Juarez-Fierro*, 935 F.2d 672, 676 (5th Cir.) (defendant's "conclusory statements" about anxiety he suffered as a result of delay, without a showing that his defense was impaired, were insufficient to support a constitutional speedy trial claim), cert. denied, 112 S. Ct. 402 (1991); *Flowers* v. *Warden*, 853 F.2d

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[6] Contrary to petitioner's assertion (Pet. 18), the parties never stipulated to the existence or authenticity of the records. See Gov't C.A. Br. 57.

131, 132-134 (2d Cir.) (where delay resulted from court congestion and there was no impairment of defense, "significant hardship" from 17 months of pretrial incarceration did not establish a constitutional speedy trial violation), cert. denied, 488 U.S. 995 (1988).[7]

2. Petitioner also contends (Pet. 19-25) that the district court's refusal to sever his trial from that of his co-defendant Donahue required reversal of his conviction. The court of appeals correctly rejected that claim.

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[7] Although petitioner's principal claim is that the delay between his indictment and trial violated his Sixth Amendment right to a speedy trial, he also suggests (Pet. 7-9) that the district court's June 1987 order granting an "ends of justice" continuance violated his rights under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* Section 3161(h)(8)(A) excludes from speedy trial calculations "[a]ny period of delay resulting from a continuance granted by any judge * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." In this case, the government and petitioner's co-defendant Staffire filed a joint motion for a continuance based on the complexity of the case and the need for additional discovery. Joint Motion for Continuance (June 2, 1987), docket entry 57; Gov't C.A. Br. 29. The district court properly found that a continuance was justified under Section 3161(h)(8)(A). See 18 U.S.C. 3161(h)(8)(B)(ii) (in determining whether to grant an "ends of justice" continuance, the court must consider "[w]hether the case is so * * * complex * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section"); see also *United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1197 (2d Cir.), cert. denied, 493 U.S. 933 (1989); *United States* v. *Vega*, 860 F.2d 779, 786-787 (7th Cir. 1988); *United States* v. *Lewis*, 759 F.2d 1316, 1352 (8th Cir.), cert. denied, 474 U.S. 994 (1985); *United States* v. *Bryant*, 726 F.2d 510, 511-512 (9th Cir. 1984). Petitioner offers no basis for supposing that the district court's evaluation of that motion raises a question meriting review by this Court.

Federal Rule of Criminal Procedure 8(b) provides that defendants may be indicted together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions." Reasoning from that rule, the courts have held that persons who are indicted together generally should be tried together, particularly (as in this case) when they are charged with conspiracy. See, *e.g.*, *United States* v. *Brooks*, 957 F.2d 1138, 1145 (4th Cir. 1992); *United States* v. *Ellender*, 947 F.2d 748, 754 (5th Cir. 1991); *United States* v. *Stephenson*, 924 F.2d 753, 761 (8th Cir.), certs. denied, 112 S. Ct. 63 and 112 S. Ct. 321 (1991); *United States* v. *Cross*, 928 F.2d 1030, 1037 (11th Cir.), certs. denied, 112 S. Ct. 594 (1991) and 112 S. Ct. 941 (1992).

Although joint trials are favored, district courts retain authority under Federal Rule of Criminal Procedure 14 to sever trials "[i]f it appears that a defendant or the government is prejudiced by a joinder of * * * [defendants] for trial together." As this Court has recognized, however, the decision whether to grant a severance is a matter within the district court's discretion, and the court's disposition of a motion for a severance is reviewable only for an abuse of discretion. See *United States* v. *Lane*, 474 U.S. 438, 449-450 n.12 (1986). Hence, it is well settled that a defendant is not entitled to a severance merely because he would have had a better chance of being acquitted in a separate trial. See, *e.g.*, *United States* v. *Martinez*, 922 F.2d 914, 922 (1st Cir. 1991); *United States* v. *Warner*, 955 F.2d 441, 447 (6th Cir. 1992); *United States* v. *Manner*, 887 F.2d 317, 324 (D.C. Cir. 1989), cert. denied, 493 U.S. 1062 (1990). Rather, because Rules 8 and 14 are designed to secure the advantages of joinder "where the[y] * * * can be achieved without substantial prejudice to the right of the

defendants to a fair trial," *Bruton* v. *United States*, 391 U.S. 123, 131 n.6 (1968), a defendant may obtain relief from the trial court's refusal to sever a joint trial only if he can show that the joint proceeding denied him a fair trial. See, *e.g.*, *United States* v. *Cardascia*, 951 F.2d 474, 482 (2d Cir. 1991); *United States* v. *Featherson*, 949 F.2d 770, 773 (5th Cir. 1991), cert. denied, 112 S. Ct. 1771 (1992); *United States* v. *Leiva*, 959 F.2d 637, 641 (7th Cir. 1992).

In this case, the court of appeals concluded that the district court's refusal to sever petitioner's trial from that of his co-defendant did not deprive petitioner of a fair trial. That determination was plainly correct. Donahue's contention that he was duped by petitioner into piloting the Albatross to Colombia was presented only through the argument of Donahue's counsel, not through the introduction of evidence implicating petitioner. The jury was fully capable of discerning that Donahue's attorney was attempting to exculpate his client by shifting blame for the smuggling venture to petitioner. Moreover, as the court of appeals pointed out, the government presented "overwhelming" evidence that petitioner had directed the smuggling operation and had supervised the other participants in the venture. Pet. App. A31. In light of that evidence, the suggestion by Donahue's counsel that Donahue had acted at petitioner's behest added little to the case against petitioner. Cf. *United States* v. *Lane*, 474 U.S. at 450 (misjoinder under Rule 8 was harmless "[i]n the face of overwhelming evidence of guilt"). Under those circumstances, the court of appeals correctly concluded that any error in the district court's denial of petitioner's severance motion did not require reversal of his conviction.

This Court has granted certiorari in *Zafiro* v. *United States*, 112 S. Ct. 1472 (1992) (No. 91-6824), to consider whether the presentation of antagonistic defenses entitles criminal defendants to separate trials. The Seventh Circuit in *Zafiro* rejected the principle, urged by the defendants in that case, that defendants are entitled to a severance when they raise antagonistic defenses at trial; instead, the court held that a severance is required "only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants." *United States* v. *Zafiro*, 945 F.2d 881, 885 (7th Cir. 1991). In this case, the court of appeals stated the rule sought by the petitioners in *Zafiro*, that "[s]everance is mandated if a co-defendant's defense is antagonistic and mutually exclusive," Pet. App. A29, but concluded that the district court's refusal to grant petitioner a separate trial based on the presentation by Donahue's counsel of an antagonistic defense did not require reversal of petitioner's conviction because of the absence of "compelling prejudice." Pet. App. A31. Thus, even if this Court concludes in *Zafiro* that defendants who present antagonistic defenses are entitled to a severance, it would be unlikely to reverse the judgment of the court of appeals in this case.[8] Nevertheless, because a decision in favor of the petitioners in *Zafiro*

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[8] Petitioner has done little to identify precisely what he found objectionable about the statements of Donahue's counsel at trial. See Pet. 20-21 (stating that the closing argument "incriminated Petitioner at every opportunity," but not identifying any particular statement as prejudicial). The court of appeals' opinion did not identify any particularly prejudicial statement. See Pet. App. A25-A26, A31, A34-A35. Petitioner did not brief the issue in the court of appeals, but simply adopted the arguments made by his co-defendant Staffire, see Gov't C.A. Br. 71.

might undermine the conclusion of the court of appeals that the antagonistic defenses arguably presented at trial were not sufficiently prejudicial to justify reversal of the conviction, the Court may wish to hold the petition pending resolution of *Zafiro*.

3. Petitioner also contends (Pet. 25-30) that the district court erred in failing to conduct a hearing on his motions to suppress evidence seized during the search of his house. That claim does not warrant review by this Court.

Under *Franks* v. *Delaware*, 438 U.S. 154 (1978), a district court must hold a hearing whenever a defendant makes a "substantial preliminary showing" of intentional or reckless inclusion of false statements by the affiant in a warrant affidavit if the allegedly false statements were necessary to the finding of probable cause. *Id.* at 155-156. The Court made clear in *Franks*, however, that there is a "presumption of validity" with respect to the affidavit supporting a search warrant. *Id.* at 171. Moreover, because the district court's task in sifting through the materials submitted by a defendant in support of a *Franks* claim and weighing the possible inferences those materials raises "involve[s] essentially the same process as fact-finding," reviewing courts accord deference to the district court's determination whether a *Franks* hearing is required. See *United States* v. *Pace*, 898 F.2d 1218, 1227 (7th Cir.), certs. denied, 497 U.S. 1030 and 498 U.S. 878 (1990). Petitioner has proffered nothing to suggest that the court of appeals erred in upholding the district court's decision not to hold a hearing.

Petitioner notes (Pet. 25) that one of his suppression motions alleged that the search warrant affidavit contained material misrepresentations and omissions, but

he does not identify the alleged inaccuracies in the affidavit or offer any explanation for his claim that he had made the "substantial preliminary showing" required to obtain an evidentiary hearing under *Franks*. There is no reason for this Court to revisit the district court's determination that petitioner failed to make the requisite showing to warrant a *Franks* hearing.

Petitioner also "presumes" (Pet. 28 n.12) that the district court's denial of his *Franks* motion without a hearing was based upon a mistaken application of the "good-faith" exception to the exclusionary rule set forth in *United States* v. *Leon*, 468 U.S. 897 (1984).[9] As petitioner acknowledges, however (see Pet. 28 n.12), the court did not expressly justify its ruling on that ground. Petitioner's only support for his interpretation of the district court's ruling is an exchange on the first day of trial in which the court questioned petitioner's counsel about the application of the good-faith exception, on which the government relied with respect to petitioner's claim that the warrant was inadequate on its face. See Answer to Motion to Suppress 8-9. It is much more plausible to interpret the court's comments as addressed to the adequacy of the warrant than to the *Franks* issue. There is certainly no basis to suppose that the court's rejection of petitioner's suppression motion on a later date rested on a theory (not advanced by the government) that the good-faith exception would validate a search based on a warrant secured in violation of *Franks*.

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[9] The Court stated in *Leon* that despite its adoption of the good-faith exception, "[s]uppression * * * remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." 468 U.S. at 923.

Nor is there any support for petitioner's assertion (Pet. 25-26) that the district court was required to conduct an evidentiary hearing on his claims that the evidence should have been suppressed because the warrant affidavit was insufficient to establish probable cause and contained stale information and unreliable hearsay, and that the scope of the search exceeded that authorized by the warrant. Petitioner merely recites those contentions without explanation or argument and he fails to identify any evidence the district court could have received at a hearing that would have supported his claims. In sum, petitioner suggests no persuasive reason for this Court to disturb the determination of the court below that petitioner's suppression motions properly were denied without an evidentiary hearing.[10]

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[10] Petitioner also contends (Pet. 30-33) that the court of appeals should have reversed his conviction based on "cumulative error committed before and during trial." Petitioner lists a number of claims that he raised in the court of appeals and asserts (Pet. 33) that the court "could not have considered the cumulative effect of each error to determine whether, viewing the trial as a whole, Petitioner received a fair trial." Contrary to petitioner's suggestion, however, the court of appeals specifically stated that it was "convinced that [petitioner] received a fair trial" and that it had "carefully examined" petitioner's claims and found them to be "without merit." Pet. App. A31, A36. Petitioner offers no substantial basis for further review of those claims by this Court.

CONCLUSION

With respect to the second question presented, the petition should be held for *Zafiro* v. *United States*, No. 91-6824, and disposed of in accordance with the decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

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DECEMBER 1992